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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 662

JOHN BUNDTE and WILLIAM PHILLIPS,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

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In the Supreme Court
OF THE
UNITED STATES

OCTOBER TERM, 1948
No. 662

JOHN BUNDTE and WILLIAM PHILLIPS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT OF THE CASE

Petitioners request a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District, to review the decision of said court affirming the judgment of the Superior Court of the State of California, in and for the County of Mendocino, which found petitioners guilty of the crimes of riot and assault with a deadly weapon.

Pursuant to the convictions under certain counts of the indictment sentences were imposed by the trial court to run concurrently in the California state penitentiary at San Quentin on the felony charges and in the county jail of Mendocino County on the riot charges.

The judgment of the District Court of Appeal sought to be reviewed was entered September 28, 1948 (Tr. 687-703), and is reported in 87 Advance California Appellate Reports 829. A petition for rehearing in said court was filed by petitioners herein (Tr. 703-716). The district court issued a modification of its opinion. The opinion with this modification was approved and the petition for rehearing was denied (Tr. 716-717) (87 Advance California Appellate Reports, 1023).

A petition for hearing in the California Supreme Court * was filed by petitioners herein and denied by said court on October 25, 1948 (Tr. 732), the decision of the District Court of Appeal thus becoming final.

In view of the inaccuracies contained in petitioners' statement of the case, their failure to adopt the facts as set forth in the appellate court's opinion and their incorporation of argumentative material in the statement, we deem it necessary to set forth an additional statement pursuant to Section 4 of Rule 27 of this court.

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* It should be noted that the statement, contained on page 4 of the petition for writ of certiorari, that the appeal from the Mendocino Superior Court was taken to the California Supreme Court was erroneous as under Article VI, Section 4b of the California Constitution the District Court of Appeal has original appellate jurisdiction in criminal cases on questions of law alone from superior court except in cases in which a judgment of death has been rendered.

Defendants and petitioners herein were members of the Lumber and Sawmill Workers Union affiliated with the United Brotherhood of Carpenters and Joiners of America, A. F. of L. (Tr. 396, 566). The members of this union were engaged in a labor dispute between their organization and certain redwood lumber companies in Mendocino County, California. The acts involved in the first two counts of the indictment occurred on January 30, 1947, at the Hollow Tree Lumber Company mill in Mendocino County, California. The riot charged in count three of the indictment, together with the assaults covered in the nine remaining counts, occurred February 4, 1947, at the Richardson Lumber Company sawmill near Willits, Mendocino County, California (Tr. 25-29).

Petitioners, together with thirty or more union men, were engaged in picketing two adjacent lumber mills near Willits, Mendocino County, California (Tr. 46, 133, 184, 396). The assaults were made on nonunion employees of the mills and upon the driver of a truck who was hauling lumber from another mill to Oakland, Alameda County, California (Tr. 65, 143, 164, 188, 218, 224, 240, 256, 263, 340). The assaults were made by the defendants and their associate pickets acting together upon the nonunion workers by hurling rocks at them.

The riot charged in counts one and two occurred January 30, 1947, at the Hollow Tree Lumber Company mill located nine miles east of Rockport on the highway from Willits to Fort Bragg, Mendocino

County, California (Tr. 34, 66). Prior to the disturbance, the mill had been picketed by a small group of men estimated at not more than ten (Tr. 33). At the time of the disturbance in question the number of pickets had been increased to 30 or 35 (Tr. 46, 133, 398).

The evidence with reference to count one of the indictment disclosed that on January 30, 1947, the mill foreman, with the nonunion employees, left work to go to lunch at the cookhouse some distance down the roadway. They were compelled to pass through the picket line of 30 or 35 men congregated at the entrance to the mill (Tr. 46). Defendants were among these pickets (Tr. 36). The sheriff's deputy formed an aisle through the pickets along which the nonunion employees passed (Tr. 116). At that time defendant Bundte held in his hand a switch which he was flipping back and forth to intimidate the passing workmen (Tr. 103, 116-17, 134). The officer warned him not to strike anyone with it. No one was struck (Tr. 134, 689). When the nonunion workmen went down the road about one hundred yards George Sherrard, one of the strikers, suddenly stepped from behind a clump of bushes and hastened toward them (Tr. 36). He was muttering and using "some pretty bad language." (Tr. 117.) He bumped against Mr. Smith who was in the lead and deliberately "rushed and struck the face of Charles Scaife, the mill foreman." (Tr. 37, 48.) Sherrard and Scaife then clinched and a scuffle ensued (Tr. 48, 107). They fell to the

pavement (Tr. 51-2). Scaife's brother James tried to separate them (Tr. 58). Sherrard jumped on top of Scaife (Tr. 48, 118). At that time a large group of strikers noticed the affray and ran down there (Tr. 107). "Some of them had rocks and things in their hands." (Tr. 107, 118). Defendants Bundte and Phillips were among them (Tr. 107, 135). The deputy sheriff also ran to the scene of the affray (Tr. 107). There were other remarks passed by the strikers about getting the "S. O. B." and words to that effect (Tr. 118-119). William Smith testified: "The pickets came charging down the road, and there were sticks and stones in some of their hands. And they said, 'Let's take the bastards' or words to that effect." (Tr. 107.)

Mr. Bartolomei and John Bundte "were one of the first there." (Tr. 107.) The deputy sheriff Bartolomei, testified that he heard the defendant Phillips say, "I hope George gets the bastard," and that Bundte said to Sherrard, "Poke the ——— ———, George." (Tr. 135-8.) Shortly after the scuffle the deputy sheriff Bartolomei had a conversation with Bundte, at which Bartolomei stated, "You tell your men that there will be no more of this." Bundte responded by saying, "Men, there will be no more of this—just as much." (Tr. 139.) The inference was that Bundte thereby purposely encouraged "his men" (the strikers) to continue to use force and violence "just as much" as they desired (Tr. 139, 690). The

strikers returned to the mill, while the nonunion workers proceeded to the cookhouse (Tr. 137).

With relation to count two of the indictment, the record disclosed that at about 2 o'clock in the afternoon of January 30, 1947, there were about 40 to 45 pickets at the entrance to the mill (Tr. 68, 79). Defendants Bundte and Phillips were among this group. A lumber truck and trailer, driven by Ed Sands, came down the road and passed the entrance to the mill at a rate of about twenty-five miles per hour (Tr. 66-8). All the pickets started throwing rocks (Tr. 68). A large stone crashed through the window of the cab and struck Sands in the face. It broke his nose, cut his cheek, blackened his eye and stunned him (Tr. 68-9). He identified defendant Bundte as having thrown this rock (Tr. 69-70). He also accused defendant Phillips of throwing rocks (Tr. 69).

Robert Schenk, the treasurer of the company and William Smith testified that rocks were thrown at the time and place (Tr. 123-4). Photographs were introduced in evidence of the truck driven by Sands, showing its condition immediately subsequent to the rock throwing episode (People's Ex. 7, 8; Tr. 712). When Petitioner Phillips was afterward inferentially charged with throwing one of the rocks he said: "If we had done this a year ago the strike would be over now." (Tr. 217).

The third count charged defendants with commission of a riot on February 4, 1947, at Richardson

Lumber Company mill (Tr. 4). Each of the remaining nine counts charged them with assaults upon different named persons at the same time and place committed by the hurling of rocks (Tr. 4-9). As the nonunion men drove to work in their separate machines about 8 o'clock on the morning of February 4, 1947, they were met at the mill's entrance by 25 or 30 pickets armed with rocks and lined up on either side of the road (Tr. 144). Defendants Bundte and Phillips were among them and actively participated in the assaults which followed. Some of the strikers were heard to exclaim, "There goes another one of them S's of B——— scabs," and expressions of like import (Tr. 267-9). Rocks were thrown by the strikers at all passing cars. Windshields and windows were shattered and the cars were otherwise damaged. Some of the workmen were seriously injured and sent to the hospital for treatment on that account (Tr. 186, 220, 243, 269, 331-5). The direct evidence disclosed that defendant Bundte threw rocks at Pullen, Schwartz, Wise, Henderson, Jackson, Tennison, Gibson, May, Richardson, and Ray (Tr. 170, 191, 231-2, 247, 267, 283, 286, 287, 290-1, 342, 346, 348-9, 350-3).

The direct evidence also disclosed that defendant Phillips threw rocks at Pullen, Schwartz, Henderson, Jackson, Gibson, Tennison, Ray and May (Tr. 168-9, 231-2, 268, 283, 286, 287, 290-1, 342, 347-9, 350-3).

Richardson, the owner of the mill, told the workmen to remain out of sight while he went to summon an officer (Tr. 228). In about an hour the deputy sheriff

arrived and the disturbance was quelled (Tr. 692). The chief of police of Willits discussed the assaults with the mill employees and requested them to point out the individuals who had thrown the rocks in order that he might arrest them (Tr. 538-41). One of the employees sought to identify the pickets and pointed out defendants Phillips and Bundte and also Moore as assailants. Moore replied, "You are a G. D. S. of B, so-and-so liar." (Tr. 209, 547, 603-4).

In view of the tension in the group at this time the mill employees were intimidated and did not further identify their assailants (Tr. 604). The mill had been picketed for about a month prior to the date of the incident and the greatest number of pickets at any one date prior to the incidents was approximately fifteen (Tr. 221-9).

The case is a companion case to that of *Moore, et al.* v. *People of the State of California,* No. 663, in which a petition for certiorari is also being sought from this court.

ARGUMENT

Summary of Argument

I. The Decision of the Court Below Did Not Violate Petitioners' Rights Under Either the First or Fourteenth Amendments as Neither the Right to Peaceful Picketing Nor the Question of Free Assemblage Was Involved Herein.

II. Defendants Were Convicted on Proof of Their Own Acts in Violation of the Provisions of Sections 404 and 245 of the California Penal Code.

III. The California Courts Did Not Deny to Petitioners Their Constitutional Right to a Presumption of Innocence.

IV. Joinder of the Misdemeanor Counts of Riot at Hollow Tree With the Misdemeanor Count of Riot and the Felony Counts of Assault at Richardson Mill Did Not Constitute a Denial of Due Process to Petitioners.

I. The Decision of the Court Below Did Not Violate Petitioners' Rights Under Either the First or Fourteenth Amendments

Under petitioners' first specification of error the point is raised that they were denied due process of law in that the court below assumed guilt of any or all present for acts of violence committed by some only.

The opinion of the District Court of Appeal of the State of California clearly shows that this contention of the petitioners herein is incorrect (Tr. 687-703). Petitioners were convicted upon proof of their own acts in violation of Sections 404 and 245* of the Penal Code of the State of California. There was no assumption made by the district court that "picketing was unlawful"—the issue of peaceful picketing or free assemblage not being before the court. The district court in its decision stated with reference to this point:

> "Clearly the strikers were the aggressors in both affrays, and the assaults appeared to have been deliberately planned with a common purpose to intimidate the nonunion workers and to win their strike. Those episodes may not be defended on the theory of the right of peaceful picketing. They were unprovoked assaults by unlawful hurling of deadly rocks with the intent to inflict great bodily injuries and to damage machines" (Tr. 691).

* Sections 404 and 245, Penal Code, set forth in appendix hereto.

As appears from this opinion what did engage the court's attention were the acts of violence committed by these petitioners contrary to the public peace of the State of California, accordingly, it is immaterial that petitioners herein might have engaged in peaceful picketing prior to the commission of the offenses charged. Under neither the federal nor California cases has the *commission of a criminal* act been condoned because it arose out of a labor dispute.

Lisse v. *Local Union No. 31,* 2 Cal. 2d 312, 323, 41 P.(2) 314;
In re Bell, 19 Cal. 2d 488, 122 P. (2) 22;
Carlson v. *California,* 310 U. S. 106, 84 L. Ed. 1104, 60 S. Ct. 746;
Milk Wagon Drivers U. v. *Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552.

It is apparent that the cases cited by petitioners do not support their claim of deprivation of due process. *A. F. of L.* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855, *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, and *Milk Wagon Drivers U.* v. *Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, all relate to state statutes involving picketing. In this matter, however, picketing is not the issue, but crimes of violence contrary to the peace of this State.

Due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial before an impartial judge

or judge and jury, and a right to be discharged unless found guilty (16 Corpus Juris Secundum, Sec. 579, pp. 1171-1172). Where these conditions are fulfilled, there is no violation of the guaranty of due process of law.

Such is the situation in the instant matter. Defendants were charged with the offenses of riot, violations of Section 404 of the Penal Code, and with the offenses of assault with a deadly weapon, violations of Section 245 of said code. The jury was fully instructed on the charges contained in the indictment and the defendants were found guilty of all but one of these charges. The district court of appeal found that the evidence adduced fully supported the verdicts of the jury.

Under California law the liability of a defendant for a criminal act is fixed by the provisions of Sections 31 * and 971 * of the Penal Code, whereby all persons concerned are principals whether they participate directly in said crime or aid and abet its commission (*People* v. *Best,* 43 Cal. App. 2d 100, 110 P. (2) 504, cert. denied, 314 U. S. 609). Conspiracy or concert of action comprehend nothing that is not included in the definition of "who are principals" (*People* v. *Le Grant,* 76 Cal. App. 2d 148, 172 P. (2) 554).

That these petitioners by throwing rocks did "assist," "supplement," and "excite" other participants

* Sections 31 and 971, Penal Code, set forth in appendix hereto.

in the affray, cannot be doubted; therefore, by the very acts which made them principals in and to the assaults charged, they aided and abetted all other principals, becoming themselves accessories thereto. Joint participation with those engaged in the commission of a wrongful act is strong evidence of aid and assistance. The standing shoulder-to-shoulder, one with the other, in active armed attacks on the complaining witnesses in this matter is certainly evidence of effective encouragement and assistance (*People* v. *Le Grant,* 76 Cal. App. 2d 148, 153, 172 P. (2) 554). Nowhere in the record can justification be found for the statement of petitioners that the California courts assumed the guilt of any and all present at the time in question merely because they were engaged in picketing.

Finally, it should be noted that petitioners' point that the application of Section 31 of the Penal Code to their situation resulted in a deprivation of their rights under the Federal Constitution was first raised in their petition for rehearing in the District Court of Appeal of the State of Calfornia. That court, and later the State Supreme Court, properly declined to entertain the question. Therefore, it is apparent that a federal question of substance was not properly raised in the state courts as the interpretation placed on Section 31 by the state courts was in accord with long

established law and not one which was unanticipated by petitioners.

Herndon v. *Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530;

People v. *Wade,* 71 Cal. App. 2d 646, 163 P. (2) 59;

People v. *Ojeda,* 132 Cal. App. 593, 23 P. (2) 316;

People v. *Marty,* 59 Cal. App. 503, 210 P. 964;

People v. *Ho Kim You,* 24 Cal. App. 451, 141 P. 950.

In the instant matter it is submitted that the record does not show a denial of due process and the petition should be dismissed for want of a properly presented federal question.

Bailey v. *Anderson,* 326 U. S. 203, 90 L. Ed. 3.

II. Defendants Were Convicted on Proof of Their Own Acts in Violation of the Provisions of Sections 404 and 245 of the California Penal Code.

The evidence hereinabove set forth and reflected in the decision of the District Court of Appeal, clearly establishes the defendants' activity in the affray. Not only was there direct testimony to such effect by the complaining witnesses but ample corroboration by Gibson, Ray, and Richardson. Contrary to the contention of the petitioners herein, no vicarious liability was fastened upon them but a direct personal liability for their own acts of violence. (See decision of the District Court of Appeal, Tr. 687-703).

The original transcript in this matter contained some one thousand pages of evidence. There was much

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conflict of testimony on the essential issues. However, such conflicts were resolved against the defendants and petitioners herein by the jury (Tr. 20-24) and affirmed on appeal.

People v. *Newland,* 15 Cal. 2d 678, 104 P. (2) 778;
People v. *Perkins,* 8 Cal. 2d 502, 66 P. (2) 631;
People v. *Tom Woo,* 181 Cal. 315, 184 P. 389.

We submit that the foregoing determination by the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process; therefore, this court is not warranted in refusing to accept such determination.

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

In the case of *Milk Wagon Drivers U.* v. *Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, this court, speaking through Mr. Justice Frankfurter, stated:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To sub-

stitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window smashings or burnings or bombings."

In the present case, as well as in the companion case of *People* v. *Moore, et al.*, 87 Advance California Appellate Reports, 846, the District Court of Appeal found:

"The acts, conduct and statements of the defendants and other strikers clearly indicate that they all cooperated in each of said alleged assaults. Each of them might have been charged and convicted of the riots and assaults. It is immaterial that only the defendants were so charged. There is no variance from the charges in the use of weapons, to wit, rocks, with which the crimes were perpetrated. No weapons, other than the rocks, were used in committing the assaults." (Tr. 698-699.)

As was stated in the case of *Lisenba* v. *California*, 314 U. S. 219, 227, 228, 86 L. Ed. 166, 62 S. Ct. 280, 286:

" * * * The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."

Referring to the cases cited by petitioners in support of their contention that they were convicted by proof of acts of others not proof of their own acts, we find that each of said cases is factually distinguishable and presents the court with no comparable situation.

In *Kotteakos* v. *U. S.*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the prosecution was in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy and that the jury could not possibly have found only one conspiracy, therefore, the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. In *De Jonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278, a conviction for violation of Oregon's Criminal Syndicalism Law was reversed. There it was held that a conviction under such statute for participation in a public meeting, otherwise lawful, merely because it was held under the auspices of an organization which advocated use of violence to effect political change although no such teaching was made at the meeting in question violated the right of free speech and assemblage. In *Hague* v. *C. I. O.,* 307 U. S. 496, 83 L. Ed. 1423, 59 S. Ct. 954, this court held an ordinance forbidding the distribution of printed matter and the holding of meetings in streets and public places without first obtaining a permit violated the

right of free speech and was void. In the case of *Cole* v. *Arkansas,* 333 U. S. 196, it was held a violation of due process for the State Supreme Court to sustain the conviction of appellants under another penal section than that under which they were charged, tried, and convicted, as the two sections described separate and distinct offenses. *Glasser* v. *U. S.,* 315 U. S. 60, 86 L. Ed. 680, merely affirmed a well-settled rule of law with respect to proof of conspiracy, that the declarations of a conspirator were not admissible against an alleged co-conspirator who was not present when they were made unless there was proof *aliunde* connecting the latter with the conspiracy.

In *Ashcraft* v. *Tennessee,* 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192, *Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, *White* v. *Texas,* 310 U. S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342, and *Brown* v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682, we find that convictions based on confessions obtained by the use of the third degree were reversed as a violation of due process.

It is apparent that a review of these cases discloses a far different situation obtaining than in the instant matter. There were no third degree confessions involved, no variance between the crimes charged and the proof thereof, and no void statutes involved herein. The question of the admissibility of evidence is for the state court to determine (*Lisenba* v. *California,* 314 U. S. 219, 228-229, 86 L. Ed. 116, 62 S. Ct.

280, *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674).

Due process of law is process due according to the law of the land. This process in the state is regulated by the law of the state and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;

Hurtado v. *State of California,* 110 U. S. 516, 4 S. Ct. 111, 121, 28 L. Ed. 232;

Twining v. *New Jersey,* 211 U. S. 78, 112, 29 S. Ct. 14, 53 L. Ed. 97.

Thus, it is submitted that the petitioners have failed to establish in any respect that the action of the state courts deprived them of due process of law; on the contrary, reference to the record clearly establishes that they were convicted on proof of their own acts in violating the California statutes as charged.

III. The California Courts Did Not Deny to Petitioners Their Constitutional Right to a Presumption of Innocence.

The defendants and petitioners herein were charged with riots and also with having committed assaults by throwing rocks at some nine different given and named persons. The record is replete with evidence as to their having so acted. There was no assumption indulged in by the trial court that anyone but the

State bore the burden of proving the indictment laid against defendants and petitioners. That the State so fulfilled its obligations is borne out by the record and also by the decision of the District Court of Appeal of the State of California which painstakingly set forth the evidence in support of the verdict of the jury and the judgment of the trial court. The State did not rely on the presumption that the defendants and petitioners herein by their mere presence at the time and place of the acts in question were prima facie guilty thereof but by direct evidence, as set forth in the statement of the case herein, proved that the defendants were guilty of the offenses charged against them. Neither the cases cited by petitioners nor a review of the record will substantiate the position taken by petitioners in the instant matter. Therefore, it is submitted that this contention of petitioners is entirely without merit and completely refuted by the record.

IV. Joinder of the Misdemeanor Counts of Riot at Hollow Tree With the Misdemeanor Count of Riot and Felony Counts of Assault at Richardson Mill Did Not Constitute a Denial of Due Process to Petitioners.

Defendants and petitioners contend that the joinder of the misdemeanor counts of rioting at Hollow Tree on January 30, 1947, with the misdemeanor count of rioting and the felony counts of assault at Richardson mill on February 4, 1948, constituted a prejudice "so deep and incurable as to amount to a denial of

due process." The question of joinder under the California law was thoroughly discussed and disposed of by the District Court of Appeal in its opinion (Tr. 692-697). Under Section 954 * of the California Penal Code, the uniting in an indictment of "two or more different offenses connected together in their commission" or "two or more different offenses of the same class of crimes or offenses" is permissible. The California statute makes no distinction between misdemeanors and felonies (*People* v. *Brenta,* 64 Cal. App. 91, 220 Pac. 447). A misdemeanor and a felony may belong to the same general class of offenses. In jurisdictions, such as California, where under an indictment for a felony a defendant may be convicted of a misdemeanor, separate counts for the two offenses—regardless of whether they are disdemeanors or felonies—may be joined in one indictment, provided they grow out of the same transaction or belong to the same general class of offenses which are corollary in nature.

42 Corpus Juris, Secundum, Sec. 180, p. 1140;
27 American Juris., Sec. 132, p. 690.

It is not necessary that all of the charged offenses should grow out of the same transaction, that they should have occurred on the same date or that they be perpetrated against the same person or company. It is sufficient to render valid the joining of counts

* See Penal Code of California, Sec. 954 in Appendix.

of an indictment provided the offenses are of the same class or as stated by the California Supreme Court in the case of *In re Pearson,* 30 Cal. 2d 871, 186 P. 2d 401:

> "If there is a common element of substantial importance in their commission."

To the same effect see, *People* v. *Scott,* 24 Cal. 2d 774, 778, 151 P. 2d 517; *People* v. *Duane,* 21 Cal. 2d 71, 74-77, 130 P. 2d 123.

The District Court of Appeal in its opinion in the instant case stated:

> "In this case the defendants were not prejudiced by the joining of the various counts. All of the evidence with respect to each count applied to both defendants." (Tr. 696.)

To afford due process of law an indictment or information must contain a statement of the facts which constitute the offense with reasonable certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense; but beyond this a statement of facts as to matters of detail is not necessary or essential. Due process is not denied by grouping several misdemeanor counts in one indictment or by a statute, such as Section 954, which authorizes the charging of two or more different offenses of the same class of crimes in one indictment or information.

16 Corpus Juris, Secundum, Sec. 587, p. 1180;
42 Corpus Juris, Secundum, Sec. 180, p. 1140.

As has been hitherto established, defendants and petitioners were convicted of the various counts of the indictment on evidence directly proving that defendants and petitioners committed the offenses with which they were charged. There was no assumption made by either the trial court or the District Court of Appeal of the State of California that defendants and petitioners were guilty of the riot and assault charges at Richardson Mill merely because they were present and participated in the riot charges at Hollow Tree Mill. The State of California bore the burden of proof on each count on which petitioners were charged and convicted and the evidence established guilt beyond a reasonable doubt in the case of both defendants and petitioners.

The requirement of due process of law is met where a trial is had according to the settled course of judicial proceedings, where a trial is a fair and impartial one and fundamental principles of justice are not violated. The Fourteenth Amendment does not compel a state to prescribe any particular method of trial nor prevent the legislature from making reasonable provision for and regulation of the mode of trial.

16 Corpus Juris. Secundum, Sec. 591, p. 1186.

The District Court affirmed this argument of respondent by the following language in its opinion:

> "There is ample evidence to show that each of the offenses charged in the indictment grew out of the same series of connected transactions and that

they were inspired by a common purpose on the part of the defendants and their associate strikers to perpetrate the riots and commit the assaults with rocks, of which the defendants were charged. We also think there is adequate proof that the riots and the assaults charged are offenses of the same class or character. They were all perpetrated by the same group of pickets, acting together to win a labor strike by means of force, violence and intimidation, consisting of stoning the nonunion workmen with rocks." (Tr. 693).

Since the state court in this matter has specifically affirmed the procedure adopted of joining the courts in the indictment and affirming the trial court's ruling on the admissability of evidence, it is apparent from a review of the record that defendants and petitioners were accorded a fair and impartial trial and were not denied due process of law as guaranteed them under the Fourteenth Amendment.

CONCLUSION

Upon the record and for the reasons stated we sincerely believe that the defendants and petitioners herein have not stated a federal question of substantial importance warranting this court in issuing the writ prayed for. The defendants received a very fair and impartial trial, the jury was fairly and fully instructed on all material issues and there was no miscarriage of justice. The matter was decided pursuant to the well-established principles of California law in interpreting the provisions of Section 31 of the Penal Code and the application of said code section to the facts involved in the instant matter did not deprive the petitioners of the provisions of due process of law guaranteed by the Federal Constitution. There was no misjoinder of offenses in the indictment, for it appeared from the record there was a common element of substantial importance in the commission of the offenses of riot and the charges of assault with a deadly weapon. The question of peaceful picketing and the right of free assemblage have no place in the instant matter where as the facts disclosed the sole issue was the use of force and violence by the defendants and petitioners herein to disturb the peace of the State of California. The defendants and petitioners were present during all of the affrays and not only threw stones themselves but aided and encouraged the other strikers by their conduct, statements, and active participation in the force and violence which was exercised.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

Respectfully submitted,

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Dated, Sacramento
May 16, 1949

APPENDIX

California Penal Code, Section 31

All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

California Penal Code, Section 245

Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

California Penal Code, Section 404

Any use or force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

California Penal Code, Section 954

An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

California Penal Code, Section 971

The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal.

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